No. 7765

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET B. BARRINGER and PHOENIX TITLE and TRUST COMPANY, as Trustee,

Appellants,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt; SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation; CENTRAL ARIZONA LIGHT AND POWER COMPANY, a corporation; COUNTY OF MARICOPA, a political subdivision of the State of Arizona; STATE OF ARIZONA; JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona; MITT SIMS, Treasurer of the State of Arizona; W. R. WELLS, RAYMOND L. NIER, J. ALLEN WELLS, E. L. GROSE and MAUDE M. GROSE, his wife, GLEN E. WEAVER, LUCILLE NICHOLS, NELLIE B. WILKINSON, SUSIE M. WALLACE, E. R. FOUTZ, THOMAS J. TUNNEY, and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

SUPPLEMENTAL BRIEF OF APPELLEE, GEORGE E. LILLEY, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF WINDSOR SQUARE DEVELOPMENT, INC.

THOMAS W. NEALON,
ALICE M. BIRDSALL,
Phoenix, Arizona.
Attorneys for Appellee, George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc.

THE MANUFACTURING STATIONERS INC., PHOENIX, ARIZONA

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Appellees.

SUPPLEMENTAL BRIEF OF APPELLEE, GEORGE E. LILLEY, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF WINDSOR SQUARE DEVELOPMENT, INC.

This Court in its opinion in the former hearing of this case, reported in 91 Fed. (2) at page 493, having impliedly

held that the only necessary appellee was the Trustee in Bankruptcy, and having held that the statement of evidence was sufficient to raise the issues of fact between the appellants and the Trustee in Bankruptcy, this appellee, George E. Lilley, Trustee in Bankruptcy of Windsor Square Development, Inc., feels that the issue is narrowed by such decision to the question of the validity of the lien asserted by the appellants.

Questions from the bench at the former hearing of this case suggested the propriety of a discussion of the effect of the warranty deed together with the declaration of trust as constituting a mortgage, and the further question as to whether such mortgage was recorded in the proper book to give constructive notice under the statutes of Arizona.

This supplemental brief is directed mainly to the issue thus suggested, together with the further suggestion by this appellee that if the order from which the appeal was taken is appealable, it is so only upon matters of law, and the evidence, even if the statement be properly settled, cannot be considered by this Court under the rules heretofore laid down by the Supreme Court of the United States and of this court in interpreting the provisions of the Bankruptcy Act as to appeal and review.

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Section 2312, *Revised Code of Arizona,* 1928 (Sec. 4145, R. S. '13);

Section 2309, *Revised Code of Arizona,* 1928 (Sec. 4095-6, R. S. '13).

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ARGUMENT

I

The Three Instruments Consisting of Warranty Deed, Declaration of Trust and Promissory Note Are To Be Construed as One Tripartite Agreement, and as Such Are a Deed of Trust To Secure a Debt or a Mortgage for the Same Purpose. In Arizona Such Instruments Whether Constituting Deed of Trust or Mortgage Must Be Foreclosed by Suit

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Appellant Barringer executed a warranty deed to the predecessor in interest of the bankrupt (T. R. 419-422). The predecessor in interest of the bankrupt executed a promissory note to appellant Barringer, (T. R. 453-454) and a declaration of trust was executed by both appellants and the predecessor in interest of the bankrupt (T. R. 423-452). These instruments are to be construed as a part of the same transaction and constitute a tripartite agreement, and as such are to be interpreted as creating either a deed of trust to secure the payment of indebtedness, or as a mortgage for the same purpose.

Similar transactions involving tripartite agreements where the instruments were practically the same as those

involved in this suit have been before the Supreme Court of California for construction in a number of cases.

The direct question was presented in the case of *Withers v. Bousfield,* 183 Pac. 855, 42 Cal. Appeals, 304, (rehearing denied by the Supreme Court of California September 18, 1919). In that case it was held that the instruments construed together amounted to nothing more than the execution by the corporation to plaintiff of an ordinary deed of trust to secure the payment of the note for $150,000, the language of the court being as follows:

> "The grant, bargain and sale deed of Brook-Wood Acres, executed by plaintiff and wife to Burpee and Walter, and the triparty agreement, executed by plaintiff as first party, the corporation, Brook-Wood Acres, Incorporated, the second party, and Burpee and Walter as the third parties, were intended to be effective, and must be considered and regarded, as parts of one contract. *Younger v. Moore,* supra; *San Diego Construction Co. v. Mannix,* 175 Cal. 548, 166 Pac. 325. So construed the transaction between the parties loses its complexity, and amounts to nothing more nor less than the execution by the corporation to plaintiff of an ordinary deed of trust, to secure the payment of the note for $150,000, given as the purchase price of Brook-Wood Acres, the payment of the note being further secured to the extent of their limited liability, by the contract of guaranty executed by the guarantors, who are the defendants in this action. While Burpee and Walter are not referred to in the transaction as trustees they were in fact such."

In that case the instrument was attacked as creating an invalid trust under the statutes of California, *Section* 857 *of the Civil Code,* and the court answering the contention said:

> "If, as is urged, * * * * we were thereby compelled to hold it was not a valid deed of trust, the rights of the parties could be preserved by holding the instruments to constitute an equitable mortgage (*Younger v. Moore,* supra, with power of sale as part of the security and an incident or appurtenance of the mortgage lien (*Faxon v. All Persons,* 166 Cal. 707, 716, 137 Pac. 919, L. R. A. 1916 B, 1209). 'No policy of the law is violated by treating this instrument as creating a lien in the nature of a mortgage, if it cannot be upheld as a deed of trust' *Earle v. Sunnyside Land Co.,* 150 Cal. 214, 228, 88 Pac. 920, 925."

The court cited as authority the case of *San Diego Construction Company v. Mannix,* 166 Pac. 325, 175 Cal. 548. There similar provisions were construed, and the court used the following language:

> "The declaration of trust referred to the contract of sale and specified the means and the manner in which the same should be performed. The two are to be construed as parts of one contract; the later superseding the earlier one wherever it is inconsistent therewith."

The Supreme Court of California had a similar question before it in the case of *Younger v. Moore,* 103 Pac. 221, in which it was held that the deed and the trust agreement

were to be considered as parts of a single transaction, and said that if they were compelled to hold that it was not a valid deed of trust, doubtless the rights of the parties could be preserved by holding the instrument to constitute an equitable mortgage or lien, and cited as authority therefor the case of *Earle v. Sunnyside Land Company,* 150 Cal. 214, 88 Pac. 920.

In the case of *More v. Calkins,* 24 Pac. 729, the Supreme Court of California construed similar instruments to be security for debt and required foreclosure as would be required in a mortgage, citing *Perry, Trusts,* (4th Ed.) Sec. 602x, and *Jones on Mortgages,* Sec. 1813.

In the case of *Earle v. Sunnyside Land Company,* supra, the court, quoting the rule as stated in *Howard v. Iron Company,* 62 Minn. 298, 64 N. W. 896, held:

> "The form of writing is not important, provided it sufficiently appears that it was thereby intended to create a security. If that intention appears, it will create a mortgage in equity or a specific lien upon the property so intended to be mortgaged."

In the case of *Wilson v. McLaughlin,* 67 Pac. (2) 710 the court expressly held that trust deeds executed only for security are substantially mortgages, and that the holder of such a trust deed was not the owner of the property.

From the foregoing we deem it clear that the instruments relied upon by appellant constitute under the laws

of Arizona either a mortgage to secure the payment of a debt or a deed of trust for a like purpose.

Under the statutes of Arizona whether the instrument be construed as a deed of trust to secure the payment of a debt or as a mortgage for a like purpose, they must be foreclosed as a mortgage.

Section 2312, *Revised Code of Arizona,* 1928 (Sec. 4145, R. S. '13) reads as follows:

> "Deeds of trust of real or personal property may be executed as security for the performance of contracts and shall be considered and foreclosed as mortgages or chattel mortgages."

And Section 2309 of the *Revised Statutes of Arizona,* 1928 (Sec. 4095, R. S. '13) specifically provides that the fact that the transfer was made subject to defeasance on a condition, may be proved to show that the instruments were intended as a mortgage, though that fact does not appear by the terms of the instrument. (See App. p. iv of our Answering Brief.)

II

The Instruments Described Herein Do Not Confer Ownership or Right of Possession upon the Trustee Named in the Deed or Declaration of Trust

The decisions of the California courts are directly in point that such instruments as we have been describing

do not confer any ownership or right of possession upon the trustee named in the deed or in the declaration of trust, and the Supreme Court of California in the case of *Sacramento Bank v. Alcorn, et al,* 53 Pac. 813, said:

> "True, neither does an absolute deed purport to be a mortgage; but it is shown to be so when it is established that it was given to secure a debt. The trust deed purports to have been given to secure a debt, and, if the attempt to create a trust is ineffectual, it presents all the elements of a mortgage. Indeed under the decisions it is practically, though not in legal effect, little more than a mortgage with power to convey. The legal title passes, *but it conveys no right of possession* * * * Under these decisions and statutes, it would seem that, while we must say that the title passes, *none of the incidents of ownership attach* * * *" (italics ours).

To the same effect is *Wilson v. McLaughlin,* 67 Pac. (2) 710, where the court uses the following language:

> "The claimed distinction between a trust deed and a mortgage, has no substantial foundation. Trust deeds given only as security are in substance but mortgages with power of sale. (Citing cases). The title of the trustee is limited by the contract of the parties thereto. It is held as security only, and is essentially a power over the property rather than the ownership of an interest therein. It is a legal title in the sense that the trustee may convey title upon exercising the power of sale, free from any equity of redemption of the trustor, but, except for the exclusive powers ex-

pressly conferred upon the trustee, the trustor retains and may exercise all of the rights and privileges of ownership. *Conlin v. Coyne* (Cal. App.) 64 P. (2d) 1123. After the debt has been paid, the apparent title of the trustee is a mere empty shell. To consider it as anything more than this would reverse the principle that the law recognizes substance rather than form. In so far as the express terms of a trust deed differentiate it from a mortgage, or the purposes of the law require differentiation, a trust deed must, of course, be distinguished from a mortgage, but in other respects they should be considered as essentially the same, for their general purposes are identical. As pointed out by Justice Shenk in *Bank of Italy, etc., Ass'n v. Bentley,* 217 Cal. 644, 20 P. (2d) 940, the substantial rights of the parties should not be altered because of the more or less accidental form which the security takes."

As the Arizona statutes do not permit a sale by the trustee named in a trust deed for the purpose of paying the debt, but require that the same should be foreclosed as a mortgage, it follows that the distinction between trust deeds and mortgages existing under California statutes do not exist in Arizona, but all such instruments are to be foreclosed as mortgages, and as a necessary consequence appellee, Trustee in Bankruptcy, is the owner of the lands that are the subject of this litigation and entitled to possession thereof. The most that can be said in favor of either of the appellants is that a lien has been created upon the lands in question by the instruments herein described. The validity of that lien as against the appellee, Trustee

in Bankruptcy, depends, therefore, upon a compliance by the holder of the lien with the recording statutes of Arizona.

III

Instruments Recorded in the Wrong Book do not Constitute Constructive Notice and Where They Intend to Create a Lien Are Void as Against Creditors Without Notice and the Trustee in Bankruptcy

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The deed to the Phoenix Title and Trust Company was recorded in Book of Deeds, (Book 228 of Deeds at page 518-19, T. R. 422), and was not recorded in the book prescribed by the statutes of Arizona. The declaration of trust (T. R. 423-452) *was not acknowledged and was not recorded in any book.*

As heretofore shown in this supplemental brief the instruments relied upon by the appellants must according to all the authorities be construed together as being either a trust deed to secure the payment of a debt or a mortgage for a like purpose.

As we have pointed out in our answering brief at pages 44-49, such an instrument under the statutes of Arizona must be recorded in a book separate from those in which deeds and other conveyances are recorded.

Section 854 *of the Revised Code of Arizona,* 1928, (Section 2595, R. S. '13) reads as follows:

> "Instruments Creating Liens to be Recorded Separately: All deeds of trust, mortgages, or other instruments of writing intended to create a lien, shall be recorded in a book separate from those in which deeds or other conveyances are recorded."

And as pointed out in our answering brief at page 45, Sections 849 and 850, *Revised Code of Arizona,* 1928, (Sections 2590, 2589, R. S. '13) cover the requirements of the statute with respect to books in which such instruments shall be recorded and the indices which are required to be kept therefor, such indices being a necessary part of the record.

In the case of *Stephen v. Patterson,* 21 Ariz. 308, 188 Pac. 131, the court had under consideration an instrument which it found to be an equitable mortgage, and held that such an instrument should be recorded in Book 14, Miscellaneous, the language of the court being as follows:

> "The instrument here is one falling within the class of instruments specified in subdivision 14, par. 2588, i. e.:
>
> 'Such other writings as are by law required or permitted to be recorded affecting real estate.'
>
> "The recorder is required to keep separate books in which to record instruments of this class. Paragraph 2590. We therefore hold that recording the instrument in question in Book 14, Miscellaneous,

> was proper, and that when so recorded it had the legal effect to impart constructive notice to all purchasers and incumbrances, including, of course, the defendants."

The Supreme Court of Arizona in that case particularly pointed out that mortgages which are mortgages by their express terms are to be recorded in a book denominated "Mortgages of Real Property", but as quoted above instruments which are in their nature equitable mortgages are instruments "falling within the class of instruments specified in Subdivision 14, paragraph 2588 * * * the recorder is required to keep separate books in which to record instruments of this class. Par. 2590 (Civil Code of 1913) and that when so recorded it had the legal effect to impart constructive notice to all purchasers and encumbrances." This case clearly adopted the rule laid down by the Supreme Court of California, in *Cady v. Purser,* 131 Cal. 552, 82 Am. St. Rep. 391, 63 Pac. 844, from which the Court in the *Stephen v. Patterson* case quotes as follows:

> "An instrument * * * recorded in a different book from the one directed by the statutes is to be regarded the same as if not recorded at all."

The rule laid down by the Supreme Court of California in *Cady v. Purser,* supra, as hereinbefore appears, is the rule adopted in the state of Arizona and has been followed by the courts of California up to the present time and has

been approved by the Supreme Court of California in many decisions, some of them of a very late date.

In *Central Pacific Ry. Co. v. Droge,* 151 Pac. 664, the Supreme Court of California held that under the statutes of California if an instrument were recorded in the wrong book it would still be competent evidence if properly indexed, and used the following language:

> "The effect of this section would probably be that the record of an instrument in the wrong book, if it is properly indexed, would be competent evidence of the contents of the instrument. The plaintiff did not offer any proof that it was properly indexed, and we cannot sustain the ruling of the court upon that ground. We deem it unnecessary to determine whether or not the Miscellaneous Record was competent evidence."

In *Rice v. Taylor,* 32 Pac. (2) 381, the Supreme Court of California following the case of *Cady v. Purser,* supra, held that a conveyance to impart constructive notice to subsequent purhcasers or mortgagees must be acknowledged, certified and recorded as prescribed by law, using the following language:

> "Secondly, a conveyance to impart constructive notice to subsequent purchasers or mortgagees, must be acknowledged, certified, and recorded as prescribed by law. Civ. Code Sec. 1213. In *Cady v. Purser,* 131 Cal. 552, 555, 556, 63 P. 844, 845, 82 Am. St. Rep. 391, it was held that a compliance with section 1170 of the Civil Code would not alone be effec-

tive against subsequent purchasers or mortgagees, but in addition section 1213 of the Civil Code must be complied with. It was further held, with respect to constructive notice: 'The principle upon which the rule rests is that as, under the provisions of the recording act, if the grantee of an interest in lands would protect himself against subsequent purchasers or incumbrancers, he must give notice of his interest, and as the statute provides for constructive notice in the place of actual notice, it is incumbent upon him to comply with all the requirements prescribed for such constructive notice, one of which is the correct transcription of the instrument in the appropriate book.' In that case a sheriff's deed was erroneously recorded in a book entitled 'A' of 'Bills of Sale and Agreements', and it was held that such a recordation failed to impart constructive notice of subsequent incumbrancers or mortgagees"

This case also holds that:

"The indexing of the instrument here involved as a 'note and pledge as security' did not impart to subsequent incumbrancers constructive notice of a real estate incumbrance."

The court also in this case quotes from many authorities in other states, all to the effect that not only must the instrument be properly recorded, but that it must be correctly indexed. As the statutes of Arizona are more rigid than those of California as to the indexing of records, we think that there can be no question but that the instrument in question, not being indexed as a mortgage or other

instrument affecting real property renders the instrument void as against the appellee, Trustee in Bankruptcy.

In the case of *Dougery v. Bettencourt,* 6 Pac. (2) 499, the Supreme Court of California had under consideration the question as to whether an instrument not recorded in the book provided by statute was constructive notice, the contention there being that the statutes of California provided that an instrument was recorded when deposited with the recorder, but the court held that such statute did not make such an instrument constructive notice to third persons unless it was recorded in the proper book and reaffirmed the doctrine previously laid down in *Cady v. Purser,* supra, and added thereto that there must be a proper indexing thereof, citing as authority upon the question of indexing the case of *Central Pacific Ry. Co. v. Droge,* supra, using the following language:

> "However this may be, there was certainly no recordation of the instrument in the ordinary sense of copying the same into the proper book (*Cady v. Purser,* 131 Cal. 552, 63 P. 844, 82 Am. St. Rep. 391); nor was there any proper indexing thereof (*Central Pacific Railway Company v. Droge,* 171 Cal. 32, 151 P. 663; Pol. Code, Sec. 4235a)"

IV

This Appeal not Being Taken from an Order Made in a Controversy Arising in the Course of Bankruptcy Is not Reviewable upon the Evidence

The theory of appellants is that the matter involved in this appeal is a *controversy* arising in the course of the bankruptcy proceedings and that the order appealed from was not made in a *proceeding* in a bankruptcy, but an order made in a controversy arising in bankruptcy.

Counsel for this appellee are of the opinion that the position of the appellants cannot be sustained under the interpretation of the Bankruptcy Act made by the Supreme Court of the United States in numerous cases, for the reason that when appellant Barringer filed her proof of debt in this matter, she instituted a proceeding in bankruptcy as distinguished from such a controversy, and that the claim of lien set up in the proof of debt was a mere incident to the debt.

We think it clear that the instrument set up in haec verba in the Transcript of Record, at pages 577-584, being Trustee's Exhibit E, is a proof of debt, such as was under consideration by the Supreme Court of the United States in the cases hereinafter cited.

This Honorable Court in a recent case, in re *Hercules Gasoline Company*, 91 Fed. (2) 633, has clearly outlined what constitutes a claim, and in holding that the instrument there under consideration was a claim, and that the instrument filed was a proof of debt, used the following language:

> "Since it is elementary that it is not the title but the allegations and moving portion of an instrument

> which determine its purport and effect, we see nothing worthy of consideration in appellants' contention. This claim is obviously one secured by the lien of the statute, described in it as creating a security for its payment, and the District Court committed no error in confirming the referee's order so determining it."

When we examine Trustee's Exhibit E (T. R. 577-584) we see that it comes clearly within the definition of a proof of debt or claim as defined in the opinion just referred to. It follows the form for a proof of debt outlined in the forms prescribed by the Supreme Court of the United States. It speaks of the indebtedness and fixes the amount as $75,777.85 (T. R. 580). It describes the promissory note upon which it is founded (T. R. 581) It recognizes the right of the Trustee in Bankruptcy in the property then in the custody of the Bankruptcy Court, but claims that the same "is subject, subservient and inferior to said Margaret B. Barringer's lien as aforesaid" (T. R. 582). It claims as an incident to the debt a lien upon the property in the hands of the Trustee in Bankruptcy, and uses the following language:

> "That said Margaret B. Barringer claims, and by the filing of this instrument intends to claim a first lien upon all of the premises described in said 'Exhibit D' and 'Exhibit E', respectively." (T. R 582)

It asks that the Bankruptcy Court sell the property upon which the appellant claims a lien, using the following language:

> "Said Margaret B. Barringer hereby petitions the Court to order that the said property and contracts which are subject to her lien as aforesaid, be sold for the purpose of satisfying her said indebtedness, advances, interest, attorneys' fees and costs, and for such other relief as may be meet and proper." (T. R 583)

It also sets forth "that no part of said debt, advances, interest, costs or attorneys' fees has been paid and that there are no offsets or counterclaims to the same". (T. R 583) It further sets forth that "Margaret B. Barringer has not, nor has any person by her order or to her knowledge, or belief of said deponent for her use, had or received any manner of security for said indebtedness whatever, save and except the lien arising by virtue of the Declaration of Trust and amendments thereto hereinabove mentioned." (T. R. 583). It further states:

> "That this deposition is not made by the *claimant* in person because *claimant* resides outside of the State of Arizona, and deponent is better acquainted than *claimant* with the matters and things therein stated; and that deponent is duly authorized by his principal to make this deposition and that it is within his knowledge that the *debt* hereinbefore mentioned was incurred and the said security was given as and for the consideration, and said *creditor* is constituted as hereinabove stated." (T. R. 583) (Italics ours)

And the closing paragraph of the claim is as follows:

> "IN WITNESS WHEREOF, said agent of said creditor has hereunto signed his name and affixed

his seal, when signing the deposition preceding, the 24th day of April, 1931.

(Signed) Wm. H. McKAY" (T. R. 583)

and is sworn to by Mr. McKay. (T. R. 584)

It will be noted that this instrument was sworn to on the 24th day of April, 1931, and was filed long prior to the time when the Trustee took any action towards obtaining the order which is the subject of this appeal.

While it emphasizes the position of the appellant Barringer as filing the claim for debt with a claim of lien as an incident thereto, it is only necessary to examine the instrument set up in the Transcript of Record at pages 585-586, to show that appellant Barringer intended to file a claim for her debt and to claim a lien upon the property which is the subject of this litigation and to show that she recognized the ownership and right of possession to said property in appellee, Trustee in Bankruptcy. In this instrument it will be seen that appellant Barringer objects to the sale of the property until her rights in the premises are determined, using the following language:

> "Your petitioner further objects to any sale of her said security, pursuant to any order of sale which does not expressly authorize petitioner to bid thereat and in payment to apply the amount of her claim against the purchase price." (T. R. 586)

And the prayer of that instrument is as follows:

> "WHEREFORE, petitioner prays:
> (1) That no order and/or order of sale be made until petitioner's lien be adjudicated;
>
> (2) That petitioner's lien be adjudicated and that the Trustee and all persons contesting the validity and amount thereof be required to adjudicate the validity and amount of petitioner's lien before any action be taken by the Referee in the premises." (T. R. 586)

It is the contention of this appellee that by the filing of these two instruments long prior to the application of the Trustee to sell the lands free and clear of liens, appellant Barringer instituted a proceeding in bankruptcy within the meaning of the rule laid down by the Supreme Court of the United States in the following cases:

Coder v. Arts, 213 U. S. 223, 53 L. Ed. 772;

Re Loving, 224 U. S. 183, 56 L. Ed. 725;

Taylor v. Voss, 271 U. S. 176, 70 L. Ed. 889;

Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 47 L. Ed. 1179;

Tefft, Weller & *Co. v. Munsuri,* 27 A. B. R. 338, 222 U. S. 114, 56 L. Ed. 118.

In the case of *Coder v. Arts,* supra, the claimant asked for the allowance of his notes against the estate, reserving all rights to his security in every portion thereof. The trustee filed an answer and objections to the claim of Arts, attacking both the notes and the mortgage and al-

leging in substance that the bankrupt was not indebted to the claimant in the amount claimed. The Supreme Court of the United States says:

> "We are thus brought to the determination of the question, was the proceeding instituted by Arts a controversy arising in bankruptcy proceedings, or did he institute a bankruptcy proceeding properly speaking? The answer to this question depends upon an examination of the manner in which the jurisdiction of bankruptcy court was invoked for the determination of the rights involved. The record discloses that Arts filed in due form a claim upon the promissory notes, setting them forth in detail, asking that they be allowed as a proper claim against the assets in the hands of the trustees to be administered, described the mortgage as being the only security held by him for the payment of the debt, and concluded his claims with this statement:
>
> > 'The deponent, in filing his claim herein against the bankrupt, does so with the express understanding that he makes no waiver of any portion of his security, and expressly reserves said security and every portion thereof to the amount of said claim, including the costs, if any, of collecting payment thereof out of said property held as security.'
>
> "He thus in effect presented to the trustee in bankruptcy a claim upon his notes, joined with the statement that he had security upon the estate which it was his purpose to maintain, and upon which he was

entitled to priority in the distribution of the assets. He did not, as was the case in Hewit v. Berlin Mach. Works, supra; York Mfg. Co. v. Cassell, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782, 26 Sup. Ct. Rep. 481; Security Warehousing Co. v. Hand, 206 U. S. 415, 19 Am. B. R. 291, 51 L. Ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas 789, intervene in the bankruptcy proceedings for the purpose of asserting an independent and superior title to the property held by the trustees, claiming the right to recover the property and to remove it from the jurisdiction of the bankruptcy court as a part of the estate to be administered. Arts appeared in the bankruptcy court, recognizing the title and possession of the trustee in bankruptcy, asserted his claim upon the notes, and his right to have the assets so administered and paid as to recognize the validity of the lien for the security of his claim. We are of the opinion that he thus instituted a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings. This being the character of the proceeding, its subsequent disposition and the appropriate appellate jurisdiction are to be determined by the provisions of the Bankruptcy Act governing bankruptcy proceedings.

"It is true that Arts asserted both a debt and a lien to secure the same. In such cases the procedure as to the debt or claim governs, with incidental right to consider and determine the validity and priority of the lien asserted upon the property in the hands of the bankrupt's trustee."

In the case of *Tefft, Weller & Co. v. Munsuri,* supra, the court commenting upon a similar question cites the case of Coder v. Arts, supra, among others, and uses the following language:

> "But the entire argument rests upon a misconception of the words 'controversies in bankruptcy proceedings', as used in the section, since it disregards the authoritative construction affixed to those words. Coder v. Arts, 213 U. S. 234, 22 Am. B. R. 1, 53 L. Ed. 777, 29 Sup. Ct. Rep. 436, 16 A. & E. Ann. Cas. 1008; Hewitt v. Berlin Mach. Works, 194 U. S. 296, 300, 11 Am. B. R. 709, 48 L. Ed. 986, 987, 27 Sup. Ct. Rep. 690. Those cases expressly decide that controversies in bankruptcy proceedings, as used in the section, do not include mere steps in proceedings in bankruptcy, but embrace controversies which are not of that inherent character, even although they may arise in the course of proceedings in bankruptcy."

The Court will note the distinction between the instant case and *Coder v. Arts.* In *Coder v. Arts* there was a ruling upon the claim submitted after objections had been filed thereto. For that reason the order of the court was appealable under Section 25a of the Bankruptcy Act. In the present case the Trustee filed objections to the claim of Barringer. (T. R. 163, No. 60). No ruling was ever made either allowing or rejecting the claim or any part thereof. As a consequence there is no order in the case that is appealable under Section 25a of the Bankruptcy Act.

The Supreme Court has clearly pointed out that under the circumstances as set forth, the order appealed from would not be appealable as a controversy arising in the course of a bankruptcy proceeding for the reason that appellant Barringer had instituted a proceeding in bankruptcy by the filing of her claim.

In the case of *In re Loving,* supra, the Supreme Court has clearly pointed out the difference in procedure. The claim in that case was filed as a lien claim. The Trustee filed exceptions to its allowance, but the claim was allowed for the full amount and the lien was allowed. The Trustee attempted to review as a matter of law, but this right was denied upon the ground that it was a proceeding in bankruptcy and appealable only under Section 25a. of the Bankruptcy Act, the Court citing *Coder v. Arts,* supra, as authority. The holding in the *Loving* case was to some extent modified by the Supreme Court in the later case of *Taylor v. Voss,* supra, wherein the court said:

> "* * * we conclude that in a 'controversy' arising in a bankruptcy proceeding, it is not essential to a review, *when the facts are undisputed or no longer questioned,* that resort should be had to an appeal under Sec. 24a; but that in such a case the controlling question of law may also be reviewed by a petition for revision under Sec. 24b * * *
>
> "It results that, as the controversy in the present case was presented in the bankruptcy proceeding, by consent of the parties, for determination as a matter of law on stipulated facts, it was properly review-

able by the circuit court of appeals in such matter of law under the petition for revision."

And speaking of the Loving case, the court said:

"The case did not present a 'controversy' appealable under Sec. 24a, but, as was explicitly stated, a 'proceeding' in bankruptcy relating to a proof of claim filed by a creditor with the incidental assertion of a statutory lien, as to which a special appeal was granted by Sec. 25a to be taken in ten days."

It being clear from the rulings of the Supreme Court of the United States in the hereinbefore cited cases,that the order appealed from in this suit was in a proceeding in bankruptcy as distinguished from a controversy arising in a bankruptcy proceeding, the order appealed from may not be reviewed under Section 24a as if it were a controversy arising in the bankruptcy proceeding.

As the order appealed from was not a judgment allowing or rejecting a debt or claim of $500.00 or over, it is not therefore appealable as a proceeding in bankruptcy under the provisions of Section 25 of the Bankruptcy Act.

To summarize:

Section 24a of the Bankruptcy Act provides for appeal of controversies arising in bankruptcy proceedings;

Section 24b of the Bankruptcy Act provides that the Court shall have jurisdiction to superintend and revise in matters of law cases arising in bankruptcy proceedings other than those provided for in Section 25;

Section 24b also provides that the Circuit Court of appeals shall have jurisdiction to superintend and revise in matters of law and fact in the three cases where appeal lies from proceedings in Bankruptcy under Section 25;

Section 25a of the Bankruptcy Act provides for appeal in three specified cases only. In such cases questions of law and fact may be reviewed.

Taylor v. Voss, supra, indicates that when it is sought to review a "controversy" under Section 24b, there should be an agreed statement of facts so as to leave for review only a question of law.

The only question remaining therefore is: Is the order subject to review as to questions of law under Section 24b of the Bankruptcy Act? We contend that it is not, for the reason that there is no agreed statement of facts or its equivalent, and the decision of this Court must depend upon the evidence that was introduced and the facts established by the evidence. Appellants by failing to obtain an agreed statement of facts have nothing before this Court to review.

We submit therefore to this Honorable Court that the motion to affirm filed by this appellee should be granted.

Thomas W. Nealon,

Alice M. Birdsall,

Attorneys for Appellee, George E. Lilley, Trustee in Bankruptcy of Windsor Square, Inc., a corporation, bankrupt.